APPENDIX

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[Filed Nov. 19, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35538
D.C. Nos. CV-95-06181-REJ
CR-90-60026-01-REJ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

JOSEPH JAY PICKREL,
Defendant-Appellant.

No. 96-35738
D.C. Nos. CV-95-06182-REJ
CR-90-60026-2-REJ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

JAMES PICKREL,
Defendant-Appellant.

MEMORANDUM *

Appeal from the United States District Court
for the District of Oregon
Robert C. Jones, District Judge, Presiding

Submitted November 17, 1997 **

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

In this consolidated appeal, federal prisoners Joseph Jay Pickrel and James Pickrel appeal the district court's denial of their 28 U.S.C. § 2255 motions to vacate sentences imposed after pleading guilty to conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The Pickrels contend that their attorneys provided ineffective assistance during their sentencing proceedings. We review this claim de novo. *See United States v. McMullen*, 98 F.3d 1155, 1156-57 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2444 (1997). We have jurisdiction pursuant to 28 U.S.C. § 2255, and we affirm.

A successful ineffective assistance of counsel claim requires a defendant to show deficient performance by his attorney and prejudice from that deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland*'s deficiency prong requires the defendant to demonstrate that his counsel's performance fell below "the wide range of professionally competent assistance." *Id.* at 690. The prejudice prong requires the defendant to demonstrate

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Appellants' request for oral argument is denied.

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An ineffective assistance claim may be rejected solely on the basis that the defendant did not demonstrate prejudice. *See id.* at 697.

The Pickrels contend that their attorneys were ineffective for failing to challenge the government's assumption that the Pickerels' offense involved d-methamphetamine rather than the less severely punished l-methamphetamine. This contention lacks merit because nothing in the record suggests that l-methamphetamine was actually involved in the case. *See McMullen*, 98 F.3d at 1158 (holding failure to raise Sentencing Guidelines distinction between d-methamphetamine and l-methamphetamine not ineffective assistance where attorney did not have notice that l-methamphetamine might be involved).

Next, the Pickrels argue that their attorneys were ineffective for failing to challenge the qualifications of the government's expert witness, a criminalist responsible for sampling and testing the methamphetamine. This argument lacks merit because the Pickrels have not demonstrated "a reasonable probability that," had their attorneys challenged the witness's expert credentials, "the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694.

The Pickrels contend their attorneys were ineffective for failing to challenge the government's method of calculating the weight of the methamphetamine involved in their conspiracy. We disagree. The conspiracy was found to involve 108 kilograms of methamphetamine. Under the Sentencing Guidelines, the Pickrels' base offense level would have remained the same had their offense involved as little as twenty-five kilograms of methamphetamine. *See* U.S.S.G. § 2D1.1(a)(3) & comment. (n.10) (1987). The Pickrels have not demonstrated a reasonable probability that, had their attorneys challenged the government's weight calculations in the manner they now sug-

gest is proper, the amount of methamphetamine would have been decreased from 108 to less than twenty-five kilograms. *See Strickland*, 466 U.S. at 694.

Finally, the Pickrels' contention that the cumulative effect of their attorneys' errors amounts to ineffective assistance lacks merit because the Pickrels have failed to demonstrate prejudice. *See id.*

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. CR 90-60026-1-JO

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH JAY PICKREL,
Defendant.

JONES, Judge:

Joseph J. Pickrel, a federal prisoner, moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Pickrel asserts that: (1) the government failed to show by a preponderance of the evidence that the methampetamine seized from him was type "D" rather than type "L",[1] (2) the government miscalculated the weight of the methamphetamine, and (3) promises regarding a plea bargain were not met by the government. In addition, Pickrel claims that each of these alleged errors was the result of ineffective assistance by his counsel. He seeks a reduction in his term of imprisonment.[2] After reviewing the file and record in this case, I determine that the motion should be DENIED without further proceedings.

On October 29, 1990, Pickrel pled guilty to conspiracy to manufacture and possess with intent to distribute methamphetamine (21 U.S.C. § 841 (a)(1) and § 846). For

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[1] While 21 U.S.C. § 841 is applicable to both Dextro ("D") and Levo ("L") methamphetamine, sentencing provisions for the former are more severe.

[2] Pickrel asks that his offense level be reduced from 38 to 34, which would reduce his current 240 month sentence to a term of imprisonment ranging between 151 and 188 months.

these crimes, I sentenced him, on February 12, 1991, to 240 months imprisonment. Pickrel was represented by counsel, and he was given an opportunity to object to the presentence report before his sentencing.

STANDARDS

28 U.S.C. § 2255 provides that the court shall grant the petitioner a hearing "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." The court may deny a hearing if the petitioner's allegations, viewed against the record, fail to state a claim for relief. *United States v. Popoola*, 881 F.2d 811, 812 (9th Cir. 1989). Thus, to earn the right to a hearing the petitioner must allege specific facts which, if true, would entitle him to relief. *See Popoola*, 881 F.2d at 812.

Even where the government has the burden of proof, "the burden of alleging factual inaccuracies of the presentence report is on the defendant." *United States v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994). "Failure to object to a fact in a presentence report . . . acts as an admission of fact." *Id.* This bar applies equally to collateral attacks concerning the type of methamphetamine, *United States v. Ward*, 55 F.3d 412 (8th Cir. 1995), and the quantity of methamphetamine, *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995). Pickrel attempts to circumvent the procedural bar by asserting that he received ineffective assistance of counsel.

To succeed on a § 2255 motion based on allegations of ineffectiveness of counsel, a petitioner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To show deficient performance, Pickrel must identify specific errors and omissions that fall outside "the wide range of reasonable professional assistance." *Id.* Moreover, prejudice requires more than a showing that the outcome would have been

different but for his counsel's error. Pickrel must also show that his counsel's performance rendered the result of the trial "unreliable" or the proceeding "fundamentally unfair." *United States v. Garcia*, 997 F.2d 1273, 1283 (9th Cir. 1993); *Lockard v. Fretwell*, 113 S.Ct. 838, 839 (1993).

DISCUSSION

Pickrel's first claim is that his counsel was ineffective because he failed to object to the government's characterization of the methamphetamine as type "D". In support of this claim, he relies on *United States v. Dudden*, 65 F.3d 1461, 1471 (9th Cir. 1995),[3] and *United States v. Patrick*, 983 F.2d 206 (11th Cir. 1993), which held that the government must show by a preponderance of evidence that the methamphetamine is type "D". Neither *Dudden* nor *Patrick* involved a § 2255 motion, and in both cases the defendant preserved the issue for appeal. Because Pickrel did not preserve this issue for appeal, the success of his motion rests on his ability to show his counsel acted ineffectively.

The first prerequisite to a claim of ineffective counsel is deficient performance. *Strickland v. Washington, supra*, 466 U.S. at 689. The first reported case requiring the government to prove that methamphetamine was "D" as opposed to "L" was *United States v. Patrick, supra*, 983

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[3] In *Dudden*, a government informant was convicted of conspiracy to distribute methamphetamine. No methamphetamine or lab equipment was recovered, but the district court relied upon two affidavits, prepared for sentencing in a different case, which stated that methamphetamine labs usually produce type "D" rather than type "L" methamphetamine. Defense counsel preserved the issue for appeal by objecting. On appeal, the Ninth Circuit held that the government had the burden of proving that the methamphetamine was type "D" by a preponderance of the evidence, and that presentation of general affidavits was insufficient to meet this burden. *Dudden*, 65 F.3d at 1471.

F.2d at 206, decided well after Pickrel's conviction.[4] *Dudden, supra,* which Pickrel suggests should be the standard for his counsel's performance, was not decided until September 13, 1995. In effect, Pickrel is asking that the new standard for methamphetamine cases announced in *Patrick* and *Dudden* be retroactively applied years later to evaluate his counsel's effectiveness.[5] I decline to do this. The conduct of Pickrel's counsel was well within "the wide range of reasonable professional assistance."

Pickrel has also failed to satisfy his burden of showing of prejudice, the second prerequisite to a claim of ineffective counsel. Pickrel contends that his counsel's failure to challenge the government's classification of the methamphetamine as type "D" unfairly prejudiced him. However, expert testimony by the government at Pickrel's sentencing established that the primary type of methamphetamine produced by the "ephedrine/red phosphorous" method of manufacturing employed at his drug lab is type "D."

Pickrel also has offered no evidence to indicate that his lab probably did or even could have produced type "L" methamphetamine. This alone defeats his argument because he cannot meet the essential burden of demonstrating that the trial results were "unreliable" or "fundamentally unfair." *United States v. Garcia,* 997 F.2d at

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[4] Before *United States v. Patrick* was decided, the standard was substantially different. In *United States v. Koonce,* 884 F.2d 349, 353 (8th Cir. 1988), the court found that "the government adequately carried its burden of proof" without testing to determine the type of the methamphetamine.

[5] Even if Dudden were applied retroactively, it would not help Pickrel's position. In *Dudden* no methamphetamine was recovered, while in this case both chemicals and manufacturing equipment were recovered. The chemicals recovered and the manufacturing process discovered are only used to create type "D" methamphetamine. Pickrel has the independent burden of proving prejudice, *see Garcia, supra,* which he has failed to do. *See* discussion, *infra.*

1283. The mere supposition by Pickrel that methamphetamine could have been type "L" does not establish prejudice. Absent evidence to back up his claim, he has failed to show prejudice and is not entitled to relief.[6]

Pickrel's second claim is that his counsel was ineffective because he did not adequately challenge the government's methodology in calculating the quantity of methamphetamine seized from him. At the time of his conviction, the entire weight of a methamphetamine mixture was relevant for sentencing.[7] Whether the mixture was completely homogenous or pure is not relevant for purposes of evaluating the performance of Pickrel's counsel.[8] There also is no evidence of prejudice to Pickrel, because there is no indication from the record that additional questions regarding the calculation of the quantity of methamphetamine would have made a material difference in his sentence.

Finally, Pickrel claims that his counsel was ineffective because he did not object to the government's alleged failure meet the terms of his plea bargain agreement.

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[6] Even if this court were to ignore the evidence that the methamphetamine was type "D" and assume it was type "L", Pickrel would still have to establish a reasonable probability that had he known he would be sentenced for type "D" methamphetamine, he would have gone to trial rather than plead guilty.

[7] U.S.S.G. § 2D1.1 states: "Unless otherwise specified, the weight of a controlled substance set forth in the table [i.e. the table of Controlled Substances and Quantity] refers to the entire weight of any mixture or substance containing a detectable amount of controlled substance."

[8] Note: Amendment 484 changed this rule in 1993 as follows: "except as otherwise provided, a mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." See U.S.S.G. App. C. p.482. Pickrel cannot use subsequent changes in the law in an attempt to prove that his counsel was ineffective at the time of sentencing.

There simply is no evidence to support this claim. Pickrel did have his sentenced capped at twenty years, and he was given credit for acceptance of responsibility. There is no evidence that the government made any misleading statements. The government stated that it would recommend a sentence that would be "at the low end of the sentence range," and it did. The fact that the court, in its discretion, imposed a greater sentence, does not constitute deception. Moreover, Pickrel makes no showing that he was prejudiced. He received the recommendation he bargained for.

CONCLUSION

Pickrel has failed to demonstrate any specific errors or omissions that both fall outside professional competence and which prejudiced him by rendering the result of the trial unreliable or fundamentally unfair. For the reasons stated in this order, petitioner's § 2255 motion (#272-1) is DENIED. Any other pending motions are denied as moot, and this action is dismissed.

DATED this 17th day of April, 1996.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CR 90-60026-2-JO

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES ROBERT PICKREL,
Defendant.

ORDER

JONES, Judge:

James Robert Pickrel, a federal prisoner, moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. He asserts that: (1) the government failed to show by a preponderance of the evidence that the methamphetamine seized from him was type "D" rather than type "L",[1] (2) the government miscalculated the weight of the methamphetamine, and (3) promises regarding a plea bargain were not met by the government. In addition, he claims that each of these alleged errors was the result of ineffective assistance by his counsel. He seeks a reduction in his term of imprisonment. After reviewing the file and record in this case, I determine that the motion should be DENIED without further proceedings.

SUMMARY OF FACTS

On April 5, 1990, a grand jury returned an indictment charging James Robert Pickrel, his brother, Joseph Jay Pickrel, and others with violations of federal narcotics

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[1] While 21 U.S.C. § 841 is applicable to both Dextro ("D") and Levo ("L") methamphetamine, sentencing provisions for the former are more severe.

laws. On October 29, 1990, following extensive negotiations, James Robert Pickrel pled guilty in conspiracy to manufacture and possess with intent to distribute methamphetamine (21 U.S.C. § 841(a)(1) and § 846). He was represented by counsel and given an opportunity to object to the presentence report. For these crimes, I sentenced him, on February 12, 1991, to 160 months imprisonment.

DISCUSSION

James Robert Pickrel's arguments for relief under 28 U.S.C. § 2255 are identical to those of his brother, Joseph Jay Pickrel. For the same reasons discussed in *U.S. v. Joseph Jay Pickrel*, No. CR 90-60026-1-JO (Order, April 17, 1996), his motion is DENIED without further proceedings.

DATED this 28th day of May, 1996.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

Excerpts
United States Sentencing Guidelines

2D1.1. *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)*

(a) Base Offense Level:

(1) 43, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or

(2) 38, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV, and V controlled substances and less than: (A) fifty kilograms of marihuana, (B) ten kilograms of hashish, and (C) one kilogram of hashish oil); or

(3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below.

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DRUG QUANTITY TABLE

*Controlled Substances and Quantity**	*Base Offense Level*
10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)	Level 36

*Controlled Substances and Quantity**	*Base Offense Level*
3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil	Level 34

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DRUG EQUIVALENCY TABLES

Cocaine and Other Schedule I and II Stimulants

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1 gm of Methamphetamine =
2.0 gm of cocaine/0.4 gm of heroin

1 gm of L-Methamphetamine/Levo-methamphetamine/ L-Desoxyephedri=
0.2 gm of cocaine/0.04 gm of heroin

Excerpts from
District Court Hearing Transcripts

The prosecutor called them "horrific." Transcript of Hearing, October 25, 1990, p. 3 (Appendix, No. 3). The Court indicated the severity of these sentences at various times during the sentencing hearing, stating at one point: "I just snatched away the flower of your life, 20 years." Transcript of Hearing, February 12, 1991, at p. 175 (Appendix, No. 6). The Court correctly summarized the tragic proportions of the sentences involved by saying the following:

> It's a fairly—you know, it's a very difficult thing for the Court to impose this amount of time on anybody. The fact of the matter is, you'll be doing more time than the average person who commits murder in this state, which is incredible.

Transcript of Hearing, February 12, 1991, at p. 173 (Appendix, No. 6).